



On August 27, 2007, DOT placed the claimant 'out of service' for failing to have current log records. (Tr. 4, 6) Mr. Jackson also acquired four late deliveries (Tr. 3, 5, 7, 11, Exhibits A-C, E) that cost the employer in fees. (Tr. 9) In addition, he acquired three preventable accidents: 1) September 27, 2007 - \$1,145 in damages (Tr. 5, 10, Exhibit H-pp. 1-4); 2) October 19, 2007 - \$2,112 in damages (Exhibit G-pp. 1-2); and 3) December 24, 2007 - \$16,000 damages (Tr. 7-8, Exhibit D-pp. 1-7)

In light of his violations, the employer provided additional training to assist him in improving his performance. (Tr. 4, 18, Exhibits G-p.3, H-p.5) On January 10<sup>th</sup>, the employer warned (verbally and in writing) the claimant that his job was in jeopardy after he misread his Qualcom and ended up in the wrong town, leading to another late delivery. (Tr. 5, 6, 8, 13-14) Nearly two weeks later (January 30<sup>th</sup>), Mr. Jackson was late delivering a load because he miscalculated the distance. (Tr. 13) The employer terminated him.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2009) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

*Misconduct* is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as

defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An

employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. However, in this case, the record establishes that Mr. Jackson was issued a final warning on January 10<sup>th</sup> that any future infractions would result in his termination. Although the claimant denies ever receiving any warnings, we find his testimony not credible. After receiving two retrainings, Mr. Jackson should have known that his job would be in jeopardy if he failed to improve his performance. (Tr. 4, 18, Exhibits G-p.3, H-p.5)

Considering his brief employment history, the claimant acquired ten policy violations within a short period of time some of which financially impacted the employer by over \$19,000. His repeated failures to follow protocol for either fueling, loading or preventing accidents when taken as a whole can only be characterized as "... carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer..." See 871 IAC 24.32(1)" a." See also, Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) Mr. Jackson recklessness on the job was certainly not in the best interests of the employer. Given the employer's extensive testimony and corroborating documentation, we conclude that the employer satisfied their burden of proof by a preponderance of the evidence.

#### **DECISION:**

The administrative law judge's decision dated May 21, 2009 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)" a".

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

**DISSENTING OPINION OF JOHN A. PENO:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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John A. Peno

AMG/fnv